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IN THE

Supreme Court of the United States

CRESTMARK BANK and
CRESTMARK FINANCIAL CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* COMMERCIAL FINANCE ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae, the Commercial Finance Association ("*Amicus*" or "CFA"), is the primary national trade association for financial institutions that provide asset-based financing and factoring services to commercial borrowers.[1] Petitioners Crestmark Bank and Crestmark Financial Corporation (collectively, "Crestmark") are among the CFA's approximately 240 members. Asset-based financing is generally secured by first priority liens and mortgages on various forms of collateral, including accounts receivable, inventory, equipment, real estate, and other tangible and intangible property owned by the borrowers. Financing by CFA members comprises a substantial portion of the United States credit market, exceeding $350 billion in outstanding loans. Because this financing is predicated upon first priority liens and mortgages, "secret liens" that may unexpectedly come ahead of the lender's liens and mortgages are of paramount concern to the CFA and its members. *Amicus* believes that the Sixth Circuit's decision, *In re Spearing Tool and Mfg. Co.*, 412 F.3d 653 (6th Cir. 2005), was incorrect, and that the *Writ of Certiorari* sought by the Petitioners should be granted.

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1. Pursuant to S. Ct. R. 37.6, the *Amicus* states that no counsel for a party to this action authored any portion of this brief *amicus curiae* and that no person or entity, other than the *Amicus*, made a monetary contribution to the preparation or submission of this brief. Written consent of all parties to the filing of this brief has been filed with the Clerk of the Court pursuant to S. Ct. R. 37.2(a).

SUMMARY OF ARGUMENT

In its opinion in *Spearing Tool*, the Sixth Circuit incorrectly held that a Notice of Federal Tax Lien, prepared and filed by the Internal Revenue Service (IRS) against a Michigan corporation using an inaccurate variation of the corporation's registered name, took priority over a lender's previously filed security interest perfected by a Uniform Commercial Code (U.C.C.) financing statement using the corporation's exact registered name. Repeated official searches of the corporation's exact registered name conducted by the Michigan Secretary of State at the lender's request did not and, indeed, could not reveal the government's lien because of the government's use of an inaccurate name in its filing, and the well-defined manner in which modern computerized search logic operates. Nevertheless, the Sixth Circuit erroneously concluded that the government's filing satisfied the requirement of 26 U.S.C. § 6323 (2000) that a Notice of Federal Tax Lien "identify the taxpayer," and was, therefore, entitled to priority over the lender's U.C.C. filings as to the lender's subsequent advances.

In so holding, *Spearing Tool* undercuts the decision of this Court in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979). There, the Court expressly held that a primary purpose of the Federal Tax Lien Act of 1966 (FTLA), Pub.L.No. 89-719, 80 Stat. 1125 (codified as amended in scattered sections of 26 U.S.C., 28 U.S.C., and 40 U.S.C.), was to "modernize" the relationship between federal tax liens, on the one hand, and the interests of commercial creditors, on the other. *Kimbell Foods*, 440 U.S. at 738, 99 S. Ct. at 1463-64. The Court in *Kimbell Foods* emphasized that in "structuring financial transactions, businessmen depend on state commercial law

to provide the stability essential for reliable evaluation of the risks involved." 440 U.S. at 739, 99 S. Ct. at 1464. The Sixth Circuit decision unfairly places lenders, purchasers and others who routinely rely on the integrity of official, State-operated, computerized lien filing systems in jeopardy of losing priority to undiscoverable government liens. The *Spearing Tool* decision will unduly burden secured lenders and the courts by inviting the government to litigate whether an admittedly incorrect name of the borrower in tax lien filings is "close enough" to be given priority over the U.C.C. filings of secured lenders who have done everything the law requires to perfect their security interests. *Spearing Tool* unfairly subordinates to secret government liens the liens of commercial lenders who have otherwise assured themselves, through official searches of computerized U.C.C. and tax lien records conducted by State authorities, that no tax liens or other filings are entitled to priority over their positions.

By not simply requiring the government to use a corporation's easily ascertained registered name to "identify the taxpayer" in a federal tax lien notice, just as private parties are required to do in filing their U.C.C. financing statements, the Sixth Circuit decision increases credit costs borne by all borrowers and creates irremediable credit risk. After *Spearing Tool*, secured lenders face heightened risks that federal tax lien filings will not be revealed by official computerized searches conducted against the borrower's correct name. Secured lenders seeking to minimize these risks must now guess at, and search, countless name variations the government might choose to include in a tax lien filing. These additional searches have already caused, and will continue to cause, needlessly increased lien search costs that are typically borne by borrowers. Yet, despite those added searches and costs, the lender still cannot be sure of finding

secret government lien filings. In marginal cases, the additional risks posed by the Sixth Circuit decision will convince lenders not to extend credit, and will likely force some borrowers into bankruptcy that might have been able to obtain financing if not for the lender's justified fear of undiscoverable government liens.

Since Article 9 of the U.C.C. contains the only standard for "identifying the taxpayer" that comports with modern search and filing technology, this Court, consistent with its prior holding in *Kimbell Foods*, should grant the Petition. This Court should hold that, in the case of a government tax lien notice against a corporation, for the government's filing to be valid and entitled to priority over third parties who hold otherwise prior, perfected interests under State law, the tax lien notice must "identify the taxpayer" using the exact registered name of the corporation.

REASONS FOR GRANTING THE PETITION

I. *Spearing Tool* Undercuts the Holding of This Court in *Kimbell Foods*

If the Sixth Circuit decision stands, a U.C.C. financing statement filed by a private party to perfect its security interest must precisely spell out a corporate borrower's exact registered name, while an IRS tax lien notice against the same corporation may use mere approximations or variations of the corporation's name, even if such variations render the government's filing undiscoverable under the official filing and search systems operated by the States. Such a result would severely undercut the holding of this Court in *Kimbell Foods*. In *Kimbell Foods*, this Court held that the primary purposes of the FTLA were to lessen the government's ability

to rely on secret tax liens to defeat private secured creditors and, by modernizing the relationship between the FTLA and the U.C.C., to prevent the impairment of commercial credit:

> In enacting this legislation, Congress sought to "improv[e] the status of private secured creditors" and prevent impairment of commercial financing transactions by "moderniz[ing] . . . the relationship of Federal tax liens to the interests of other creditors." S.Rep.No. 1708, 89th Cong., 2d Sess., 1-2 (1966), U.S.Code Cong. & Admin.News 1966, p. 3722; see also H.R.Rep.No. 1884, 89th Cong., 2d Sess., 35 (1966).

440 U.S. at 738, 99 S. Ct. at 1463-1464; *See Pine Builders, Inc. v. United States*, 413 F. Supp. 77, 80 (E.D. Va. 1976) ("The purpose of the Act, we believe, was to fit tax liens into the priority scheme of the UCC.").

According to the Court in *Kimbell Foods*, Congress sought to improve the status of secured creditors by enacting the FTLA, and nothing in the FTLA indicates a federal interest in granting the government priority over commercial lenders where the government has prepared its tax lien notices in a manner that renders them hidden from private secured creditors. The FTLA "provides further evidence that treating the United States like any other lender would not undermine federal interests." 440 U.S. at 738, 99 S. Ct. at 1463. As explained by a leading commentator, Barkley Clark, *Spearing Tool* deviates from the intent of the FTLA by adopting a federal standard at odds with the standard governing debtor names in financing statements filed under the U.C.C.:

> One of the primary purposes of the 1966 Federal Tax Lien Act is to dovetail with Article 9 of the UCC. The statute and the regulations implementing it give the IRS plenty of flexibility to adopt internal operating procedures that run parallel to Article 9 so that all searches . . . can operate according to the same rules . . . Though federal law clearly trumps state law, the UCC rules governing debtor names should be considered the proper standard for federal tax lien filing.

1 Barkley Clark et al., *The Law of Secured Transactions Under the Uniform Commercial Code*, ¶ 5.02[6][a] at 5-14 (rev. ed. 2005).

Thus, the decision below goes too far. The Sixth Circuit, by invoking the Supremacy Clause, disregards uniform State law, well-developed commercial practice, and the characteristics of modern search and filing technology, despite the fact that neither the FTLA nor the regulations promulgated thereunder preclude the adoption of State debtor identification standards as the governing standard under the FTLA. The Sixth Circuit decision awards the federal government an unfair advantage over all private parties, including secured lenders. *Spearing Tool* allows the government to achieve priority based on a tax lien filing that cannot be discovered by a private party who requests an official search under the debtor's exact registered name. This result is squarely at odds with the underlying purpose of the FTLA.

II. Modern Search and Filing Systems Necessitate an Exact Name Standard for Federal Tax Lien Filings

In addition to unfairly favoring the government with a lesser standard of precision in identifying the taxpayer than applies to secured parties filing under Article 9 of the U.C.C., the Sixth Circuit decision adopts a rule anchored on characteristics of an antiquated filing system that no longer exists. The days are long past when a paper page in a county index could contain a federal lien filed under an erroneous or approximate name that is found, by visual inspection by a human searcher, because it appears "directly above a correctly filed lien under the taxpayer's correct name . . . ." *Crestmark Bank v. United States (In re Spearing Tool & Mfg. Co., Inc.)*, 302 B.R. 351, 356 (E.D. Mich. 2003), *rev'd*, 412 F.3d 653 (6th Cir. 2005).

The States, in a marked departure from paper-based records, have created and currently operate, for both U.C.C. filings and federal tax lien filings, computerized filing and search systems that employ rigid, but well-defined, search logic. This change has profound implications for establishing a workable standard to identify parties in filings that can be electronically searched. The drafters of Revised Article 9 recognized this and crafted the exact name standard for registered organizations, such as corporations, with this searchability requirement in mind. *See Pankratz Implement Co. v. Citizens Natl. Bank*, 130 P.3d 57, 2006 Kan. LEXIS 141 (Kan. March 17, 2006) (where filing office's search logic did not reveal creditor's filing that contained misspelling of borrower's name, filing was seriously misleading as a matter of law, relying upon *Clark v. Deere & Co. (In re Kinderknecht)*, 308 B.R. 71 (B.A.P. 10th Cir. 2004)); *Host America Corp. v. Coastline Financial, Inc.*, 2006 U.S. Dist. LEXIS 35727 (D. Utah May 30, 2006) (use of standard search logic failed to reveal filing and therefore filing was seriously misleading).

As correctly noted by the District Court in this case, and fully consistent with the framework for filings and searches created under Revised Article 9 of the U.C.C., the "Secretary of State will not search variants of the name (as it did under [former Article 9]), and the public has no independent access to search the index." *Spearing Tool*, 302 B.R. at 356 (footnote omitted). *See In re FV Steel & Wire Co.*, 310 B.R. 390, 394 (Bankr. E.D. Wis. 2004) ("'the secured party is dependent on the kind of computer search logic used by a particular state's filing office. *The simple solution is to get the debtor's name right.*'" (citation omitted; emphasis in original)); *Miller v. Van Dorn Demag Corp. (In re Asheboro Precision Plastics, Inc.)*, 2005 Bankr. LEXIS 1091 at *22-23 (Bankr. M.D.N.C. March 1, 2005) ("'Under the new standard, a name error is fatal if a search under the correct name, using the filing office's standard search logic, would not disclose the financing statement.'") (citation omitted).

Under the current search regime, computerized searches conducted by the State filing offices are the only means by which a prospective creditor may obtain a federal tax lien and U.C.C. financing statement search report upon which it may legally rely. In this environment, certainty and equality of treatment require all creditors to file and search using a corporate debtor's registered legal name. It is "not reasonable for searchers to conduct one search for liens that might include federal tax liens, and require them to conduct separate, multiple searches under the debtor's multiple possible names for a possible federal tax lien." (302 B.R. at 356-57).

Given the realities of the filing and search system as it *now* exists, the requirement to "identify the taxpayer" must be interpreted in a manner that comports with the most basic

requirement for a notice filing — that the filing be capable of being found with a proper search. To conform to this standard, the government would be required to do no more than that which every private party must do under Article 9 of the U.C.C. to assure itself of priority, *i.e.*, file its liens under the corporation's easily ascertainable registered name.

III. *Spearing Tool* Impairs the Availability of Credit and Increases the Costs of Borrowing

The Sixth Circuit decision unfairly and needlessly imposes added costs and risks on lenders and other parties who depend upon the integrity of a workable computerized lien filing and search system. *Spearing Tool* compels lenders to conduct multiple searches of possible name variations, abbreviations, and misspellings every time credit is advanced (or every 45 days in the case of revolving lines of credit where advances are made daily), in an attempt to uncover a tax lien. Lenders must request myriad searches when the transaction involves borrowers whose names include words that are commonly abbreviated in more than one way. For example, countless borrowers have the word "Federal," "Associated" or "General" in their names, and there are several common abbreviations of these words. The quandary that *Spearing Tool* creates, therefore, is how a lender can determine with certainty which variations exist and are common enough to require a search. "*Thanks to the Sixth Circuit decision, secured lenders have a new headache. Unfortunately, finding competing tax liens can be a little like looking for a needle in a haystack.*" Barkley Clark et al., *Clark's Secured Transactions Monthly* (July 2005) (emphasis added).

Even worse, despite undertaking a burdensome and costly effort to protect itself by ordering numerous searches under name variations, a lender still remains in jeopardy of its liens being subordinated if it fails to guess which incorrect version of the borrower's name actually appears on the government's tax lien notice:

> After *Spearing Tool*, Article 9 filing systems searchers can find all effective filings only by searching in at least some incorrect names — with no way to know for sure *which* incorrect names. The effect is to leave filers and searchers trapped in a twentieth-century filing system, continuing to waste resources on a problem technology has already solved, because a single court rejected that technology at the critical moment.

Lynn M. LoPucki, "The Spearing Tool Filing System Disaster" (2006) at 34, UCLA School of Law, Law-Econ Research Paper No. 06-10; available at SSRN: *http://ssrn.com/abstract=890312.*

Indeed, the criticism of *Spearing Tool* leveled by Clark and Professor LoPucki accurately reflects the broader criticism that has been directed at the Sixth Circuit decision. Multiple journals and publications have been unsparing in their disappointment with *Spearing Tool*, *e.g.*, Meghan M. Sercombe, Note, *Good Technology and Bad Law: How Computerization Threatens Notice Filing Under Revised Article 9*, 84 Tex. L. Rev. 1065, 1089 (March 2006) ("The end result is a disastrous conflict between state and federal law . . ."); Edmund S. Whitson III, *"Spearing" the Secured Creditor, Sixth Circuit Applies "Bluebook" Rule to IRS Lien Notice Requirements*, 24 Am. Bankr. Inst. J. 24, 65 (September 2005) (From a "policy perspective"

Spearing Tool is "troubling for at least two reasons."); Sandra Schnitzer Stern, *Structuring and Drafting Commercial Loan Agreements*, ¶ 22.04 at 22-5 (rev. ed. 2006) ("From the standpoint of secured creditors, this case is wrongly decided, but not merely because it favors the IRS over secured creditors."); Stephen D. Sayre & Darrell Pierce, *Secured Lenders Beware: IRS Plays By Its Own Rules In Filing Federal Tax Liens*, 61 Secured Lender at 28, 32 (September 1, 2005) ("This decision is problematic for secured lenders and at odds with the policies behind Revised Article 9.").

Adding to the woes and costs of lenders is the fact that under typical contracts for asset-based financing, the costs to the lender of performing multiple lien searches are borne by the borrower. Already, lenders continuously check for federal tax liens because of the "forty-five (45) day rule" contained in 26 U.S.C. § 6323(c) and (d); not surprisingly, these costs are typically passed on to the borrower. Thus, *Spearing Tool* only increases transaction costs to borrowers while making it more difficult for commercial lenders to determine reliably the existence of prior liens.

When lenders cannot mitigate their credit risks with reasonable commercial behavior, the cost of credit to borrowers rises. In cases where the creditworthiness of the borrower is marginal, a secured lender may elect not to lend at all or to greatly reduce the credit made available because of the additional risks of undiscovered government tax liens. This availability of credit could be the difference between the survival of a company and the filing of a petition in bankruptcy. As a result, the decision below will likely lead to more bankruptcy filings, as lenders balk at extending further credit to distressed companies that might otherwise

have received workout financing but for the lender's heightened concerns about the possible existence of undiscoverable federal tax liens.

Unfortunately, lenders have been left groping in the dark for direction because *Spearing Tool* offers no standard or guidance as to (a) how much latitude the federal government has in making erroneous filings, or (b) how extensively a secured lender must search to avoid a finding that an imprecise government filing primes its lien. The Sixth Circuit did not require the government to "identify the taxpayer" in any clear, predictable, or reliably searchable way – not even to use the name shown on the borrower's tax return. Because of this total absence of a standard, even if lenders scrupulously obtain copies of their borrowers' tax filings for search purposes, they cannot trust that the government will file liens accurately using that name.

CONCLUSION

In this era of computerized filing and search systems that are operated by the States and comprise the exclusive, official repositories of both federal tax lien notices and U.C.C. financing statements, it is imperative that the identity of the taxpayer in federal tax lien filings be defined by the same standard of precision that all other parties must follow. The appropriate standard must be one that ensures that the filing will be found, taking into account both the prevailing search technology and its limitations, and apply equally to federal tax lien notices and U.C.C. filings. Moreover, to remain consistent with the underlying purposes of the FTLA, as enunciated in *Kimbell Foods*, the standard for filing tax liens should be harmonized with the requirements of Article 9 of the U.C.C. Unless the government and private parties

are required to abide by the same standard of precision in specifying the debtor's name in their respective lien filings, an unfair advantage to the government results. Such advantage is contrary to the FTLA's overriding goal of modernizing the provisions applicable to federal tax liens within the framework for private parties' security interests under Article 9 of the U.C.C.

If secured lenders cannot rely with certainty on the lien searches they obtain from official sources, not only will they pass along the costs of the additional searches they are forced to make, but they will seek to cover the risk of secret federal tax liens by increasing the cost of the credit they extend to borrowers. Even worse, for those financially weaker businesses which need asset-based financing the most, lenders may decide to avoid the risk by extending less credit or refusing to extend credit. These results increase the cost of commerce without any countervailing justification, other than the government's wish to defend its haphazard practices under a standard that is no longer suited to the computerized filing and search systems presently in use. Additional litigation will certainly be spawned in future instances where government filings merely approximate a corporate taxpayer's name, and the government contends those filings are still "close enough," despite the fact that the government's filings could not be revealed in official searches of the correct name requested by lenders. The adverse effects of *Spearing Tool* will only become more pronounced if the uncertainties created by the decision are allowed to take hold.

For the above reasons, CFA respectfully submits that Crestmark's Petition should be granted.

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